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No. 73-725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,

Petitioner,

v.

SCHOOL CITY OF ELKHART, INDIANA; ELKHART COMMUNITY SCHOOLS, *et al.*,

Respondents.

On Petition For Writ of Certiorari To the Supreme Court of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

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December, 1973

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether a school corporation was deprived of Fourteenth Amendment rights in connection with a boundary dispute finally resolved by the Supreme Court of Indiana in 1967.

STATEMENT

This litigation involves a dispute over which of two school corporations—Elkhart Community Schools or Concord Community Schools—has jurisdiction over four parcels of land annexed by the City of Elkhart, Indiana, in 1966. The land is situated in Concord Township, whose boundaries overlap the City of Elkhart. The validity of the annexations is not in dispute.[1]

Pursuant to the Indiana School Corporation Reorganization Act of 1959,[2] an election was held in May 1966 approving a reorganization consolidating the previously separate school corporations of the City of Elkhart and the townships of Cleveland, Osolo, and Washington into a single school corporation to be known as Elkhart Community Schools (hereafter referred to as "Elkhart"). The reorganization plan defined the boundaries of the new consolidated corporation to encompass "the Civil City of Elkhart" as well as the three townships. Pet. App., p. A-59. The boundaries of the adjacent Concord township school corporation (known as Concord Community Schools and hereafter referred to as "Concord") were defined in its previously approved reorganization plan to exclude all areas of Concord township lying within the city limits of Elkhart. Pet. App., p. A-29.

Immediately after the Elkhart reorganization election, Concord sued Elkhart and other defendants for injunctive and declaratory relief based on its contention that the four areas annexed by the City of Elk-

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[1] These annexations were strictly civil city legislative actions unrelated to any school corporation action.

[2] Burns' Ind. Stat. Ann. §§ 28-3501 et seq., 1971 IC 20-4-1 et seq.

hart in 1966 remained within Concord's jurisdiction for school purposes. Concord claimed that the approved reorganization could not encompass these annexed areas because the "Bodine Act" of 1963,[3] an Indiana statute specifying a method for transferring territory from one school corporation to another that had not been invoked in this case, established the exclusive method for changing school corporation boundaries in Indiana. Pet. App., p. A-56.

After hearing, the trial court granted Concord a temporary injunction. Elkhart appealed directly to the Supreme Court of Indiana. Both parties agreed, in accordance with substantial Indiana precedent, that the appeal should be submitted to the Supreme Court on the merits of the claims for final declaratory and injunctive relief, since all pertinent facts and authority had been thoroughly presented in the hearing below.[4] The Supreme Court of Indiana treated the case as so submitted and reversed the trial court with instructions to dissolve the temporary injunction

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[3] Burns' Ind. Stat. Ann. §§ 28-3601 et seq., 1971 IC 20-4-4-1 et seq.

[4] Concord's brief to the Supreme Court of Indiana (pp. 29-30) stated:

> "Concord joins with the appellants in their request that this matter be deemed submitted to this honorable court on the merits. We agree with the appellants that all the facts and all authority were presented below with respect to such temporary injunction which might hereafter be submitted in determining the issue as to a permanent injunction and declaratory relief. It is further agreed that the case below was fully briefed on the merits and will be fully briefed on the merits before this court. The interest of all involved parties together with the interest of the public necessitate an early disposition of this matter on the merits."

and to enter judgment for Elkhart. Pet. App., pp. A-2, A-5.[5]

In its opinion, issued June 20, 1967, the Indiana Supreme Court sustained the Elkhart school corporation reorganization under the 1959 Reorganization Act and concluded that the reorganized corporation properly encompassed the four disputed areas. Pet. App., p. A-1. Concord filed a petition for rehearing challenging the determination that the Elkhart reorganization had complied with the 1959 Reorganization Act. The Supreme Court denied the petition on October 6, 1967. Pet. App., p. A-17. Thereafter, Concord filed a motion to modify mandate, arguing that unless the Supreme Court of Indiana modified its mandate as requested by Concord, "the lower court will enter judgment declaring all of the annexed areas to become a part of the Elkhart Community Schools as a result of the 1966 proposal."[6] The motion was dismissed by the Supreme Court on November 22, 1967. Pet., p. 11.

When the matter was returned to the trial court for entry of judgment in accordance with the Supreme Court's opinion, Concord sought leave to amend its

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[5] The final sentence of the opinion of the Supreme Court of Indiana stated:

> "The judgment herein rendered by the trial court is hereby reversed, with instructions to dissolve the temporary injunction, and the court is hereby ordered to enter a finding and judgment for the Appellants, defendants below, in accordance with the tenor hereof, both on the equity and the law questions presented." Pet. App., p. A-5.

In Indiana the opinion of the Supreme Court also constitutes its judgment and mandate.

[6] Appellee brief on Motion to Modify Mandate of the Court, p. 19. And see Pet. App., pp. A-68-69.

complaint (Pet. App., p. A-73) and filed a motion for rehearing on the merits of its claim. Pet. App., p. A-77. The trial court denied these motions (Pet., p. 12) and on November 21, 1967, entered its findings and judgment "pursuant to the mandate of the Supreme Court of Indiana" in favor of Elkhart and against Concord. Pet. App., pp. A-79-80.

Shortly thereafter, Concord undertook a new strategy to obtain the disputed land. It submitted to the State Commission for the Reorganization of School Corporations a new proposal for reorganizing the Concord schools to include the four disputed areas. The State Commission approved the Concord plan, but in response to a complaint by Elkhart the circuit court for Kosciusko County declared the plan invalid on the ground, *inter alia,* that its effect was to circumvent the 1967 decision of the Indiana Supreme Court. Pet. App., p. A-41. The Court of Appeals reversed (Pet. App., p. A-28), but on July 20, 1971, the Supreme Court of Indiana reversed the Court of Appeals and affirmed the circuit court, holding that the action of the Commission was an improper effort to nullify the Supreme Court's earlier decision. Pet. App., p. A-39. The court stated that:

> "It was the decision of this Court in that case that a certain disputed territory was within the boundary of the school district of Elkhart, and this Court ordered the trial court to enter final judgment accordingly." Pet. App., p. A-40.

Following the entry of final judgment by the trial court in the original litigation on November 21, 1967, in accordance with the 1967 Supreme Court decisio (pp. 4-5, *supra*) (and after Concord had submitted its second reorganization plan to the State Commis-

sion (p. 5, *supra*)), Concord had filed on December 19, 1967, a "Motion for New Trial." Pet. App., p. A-90. No action was taken on this motion for over four years until June 6, 1972 (almost one year after the second decision of the Indiana Supreme Court) when Concord requested that the motion be set for argument. R. 220, 227. On July 11, 1972, the trial court denied the motion. Pet., p. 13. The Court of Appeals dismissed an appeal by Concord from that ruling, holding that

> "the entire subject matter of this litigation has been completely decided, determined, and adjudicated in the prior appeal of this same case. In our opinion the Supreme Court has firmly closed the door on any further litigation between these parties on the same subject matter . . . ." Pet. App., pp. A-23-4.[7]

A petition by Concord to transfer the case to the Supreme Court of Indiana was denied on August 6, 1973. Pet App., p. A-25. The petition to transfer listed among the alleged errors of the Court of Appeals its failure "to give a written opinion on the Constitutional question raised by Appellant relating to due process of law." Pet. App., p. A-108. In its brief to the Court of Appeals, Concord had contended that there was a lack of "due process" as the result of the non-compliance with certain procedural requirements of the 1959 Reorganization Act in connection with the reorganization of the Elkhart schools. At no prior stage in the litigation, and in particular at no stage in the litigation culminating in the first

[7] The main thrust of Concord's argument in the Court of Appeals was that the Supreme Court of Indiana had no jurisdiction in the first appeal to render a final decision on the merits, even though the parties had agreed and urged that it do so. Pet. App., p. A-23.

decision of the Supreme Court of Indiana in 1967 finally determining the validity and effect of the Elkhart school reorganization, did Concord in any manner raise any claim of violation of "due process" or of any provision of the federal Constitution.

On November 2, 1973, Concord filed a petition for a writ of certiorari to the Supreme Court of Indiana raising a series of questions concerning the validity of the 1967 decision of that court. Pet., p. 3.

REASONS FOR DENYING THE WRIT

Among the many grounds for denying certiorari in this case are the following: (1) the petition is untimely by several years; (2) the federal constitutional questions raised in the petition were never properly presented to the Indiana courts; (3) the decision to be reviewed rests on an adequate independent state ground; and (4) petitioner, a government entity created by the state, cannot assert Fourteenth Amendment constitutional rights against the state.

1. Although the petition ostensibly asks for certiorari to review the 1973 Indiana Supreme Court order denying transfer from the Court of Appeals,[8] its real purpose, as demonstrated by its "Questions Presented," is to review the 1967 Indiana Supreme Court decision. Since that decision became final within the meaning of 28 U.S.C. § 1257 upon the denial of rehearing on October 6, 1967 (*Chicago G.W.R. Co.* v. *Basham,* 249 U.S. 164 (1919)), the petition asking review of that decision is nearly six years out of time

[8] Concord should have requested a writ to the Court of Appeals, the court which rendered the last decision in the proceedings below. See Callender v. Florida, 380 U.S. 519 (1965) and 383 U.S. 270 (1966).

(see 28 U.S.C. § 2101(c)), and must be dismissed as untimely.

The fact that the Indiana Supreme Court's 1967 decision remanded the proceeding to the trial court for the entry of final judgment did not have the effect of extending the time for seeking Supreme Court review, since the remand left nothing for the trial court save the ministerial act of entering judgment. *Cole* v. *Violette,* 319 U.S. 581 (1943); *Department of Banking* v. *Pink,* 317 U.S. 264 (1942).

Relying on certain language in the opinion of the Supreme Court of Indiana on rehearing, Concord argues that the order denying rehearing "could easily be interpreted to require the trial court to apply the 1959 Act to the facts presented by the parties on reversal"—in other words, to conduct a trial on the merits. Pet., pp. 15-16. The argument is foreclosed by the repeated rulings of the Indiana courts (pp. 5-6, *supra*) that the 1967 Indiana Supreme Court decision was not subject to further review by a state court. See *Department of Banking* v. *Pink, supra* at p. 268. Concord so conceded in its motion to modify the Supreme Court's mandate submitted after its petition for rehearing had been denied (p. 4, *supra*). Concord's subsequent change of position, in the face of its prior concession and of its explicit plea to the Supreme Court to decide the case finally on the merits in 1967 (p. 3, *supra*), cannot disturb the finality of the 1967 Indiana Supreme Court decision.[9]

[9] Concord's virtual abandonment of this litigation following the entry of judgment by the trial court on remand from the Indiana Supreme Court, and its pursuit instead of an alternate strategy for securing the disputed territories, further demonstrates Concord's recognition that it had reached the end of the line in this litigation with the entry of the final judgment in November 1967.

2. From the outset of this litigation Concord argued that the Elkhart school corporation reorganization had failed of compliance with various features of the 1959 Reorganization Act. Yet it never based its arguments on constitutional grounds until its appeal to the Court of Appeals in 1972 from the trial court's denial of a new trial motion.[10] Neither the complaint, the appellate briefs in the first appeal round, the papers filed in the Indiana Supreme Court seeking rehearing or modification of mandate, nor the pleadings subsequently filed in the trial court even mentioned the federal constitution and none advanced any federal constitutional contention.

This court's jurisdiction to review state judgments on certiorari, insofar as relevant here, is confined to cases where rights are "specially set up or claimed under the [federal] Constitution." 28 U.S.C. § 1257 (3). The Court has repeatedly construed this statute as limiting its jurisdiction to those cases where the federal question has been properly raised in the first instance and preserved in the state courts. *E.g., Street* v. *New York,* 394 U.S. 576, 581-82 (1969). Since Concord failed even to raise a constitutional question at any point prior to final judgment in the litigation below, it cannot demonstrate, as required by the rules of this Court (Rule 23(f)), that the federal question was timely and properly raised and preserved.

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[10] Concord states that the trial court's denial of its motion to amend complaint and its entry of final judgment for Elkhart in November 1967 "necessarily decided" the federal constitution "due process questions." Pet., p. 16. However, the motion to amend complaint neither raised nor referred to any constitutional questions. Pet. App., p. A-73.

Moreover, Concord's briefs to the Court of Appeals in 1972 and to the Supreme Court in support of its motion to transfer in 1973 made only passing reference to the Fourteenth Amendment to the United States Constitution and to "due process" without citing any cases from this Court or otherwise setting up a federal constitutional argument. These slight allusions, apart from being woefully tardy, do not qualify as "distinct and positive" assertions of federal constitutional claims required to invoke this Court's jurisdiction. *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 655 (1897); *DeBacker* v. *Brainard,* 396 U.S. 28, 32 (1969).

3. In addition to the foregoing infirmities, Supreme Court review is foreclosed because the only decision subject to review (the 1973 decision of the Court of Appeals) rests on an adequate and independent state ground. In its appeal to the Court of Appeals, Concord faced the threshold necessity of demonstrating that the 1967 determination of the issues by the Supreme Court of Indiana was not final and could be attacked. It argued that the Supreme Court lacked jurisdiction to decide the merits of the dispute (even though both parties had urged the Court to do so and agreed that it could. P. 3, *supra*). The Court of Appeals rejected Concord's argument, held that the 1967 Supreme Court decision had constituted a final determination of the dispute, and accordingly dismissed the appeal. This holding, in addition to confirming the finality of the 1967 Supreme Court decision within the meaning of 28 U.S.C. § 1257, precluded Concord under state law from rearguing the merits of the dispute and foreclosed its belated effort to raise constitutional questions. This ruling was an

independent and adequate basis under state law for dismissing Concord's appeal.

The Court of Appeals' reliance on this state ground did not improperly prevent Concord from raising federal issues in its dispute with Elkhart.[11] To the extent that Concord's federal contentions are founded on the failure to comply with the procedures of the 1959 Reorganization Act, these could and should have been raised at the outset of the litigation. Concord now appears to contend in addition that a deprivation of federal rights occurred when the Supreme Court of Indiana issued its opinion in 1967. If this is meant to question the court's decision of the merits on appeal from the entry of a temporary injunction, Concord's consent to that action precludes a later constitutional challenge. If the argument is meant to be that the court's decision was on unanticipated grounds, Concord could and should have raised any constitutional question thus presented in its petition for rehearing. See *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930).

4. Apart from the foregoing grounds for dismissal of the petition for writ of certiorari, the petition should be denied on the ground, among many others, that Concord cannot set up a Fourteenth Amendment claim since it is an organ of the state wholly dependent upon the state for its existence and

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[11] Where, as here, the state court fails to pass on a federal question (assuming such a question was advanced below) this Court presumes "the omission was due to want of proper presentation in the state courts" absent a contrary showing by petitioner. Street v. New York, 394 U.S. 576, 582 (1969). No such showing has been made here.

powers[12] and is thus without capacity to complain under the Fourteenth Amendment of adverse state action.[13] *E.g., Williams* v. *Mayor & City Council,* 289 U.S. 36, 40 (1933); *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178-79 (1907); *Attorney General ex rel. Kies* v. *Lowrey,* 199 U.S. 233 (1905). Moreover, given the "vast leeway"[14] afforded to the states in the decisions of this Court involving alteration of municipal boundaries, at least where, as here, there are no overtones of racial discrimination, a mere alleged failure to comply with procedural requirements of state laws governing school boundary revisions cannot be projected into federal constitutional violations. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 179 (1907); *Gomillion* v. *Lightfoot,* 364 U.S. 339, 343 (1960); *Adams* v. *City of Colorado Springs,* 308 F. Supp. 1397, 1403 (D. Colo.) (three-judge court), *aff'd,* 399 U.S. 901 (1970).

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[12] State ex rel. Harris v. Mutschler, 232 Ind. 580, 115 N.E.2d 206, 210 n.1 (1953). The powers of school corporations in Indiana are specified by statute. Indiana General School Powers Act, Burns' Ind. Stat. Ann. §§ 28-1701 et seq., 1971 IC 20-5-1 et seq.

[13] This case was brought in the name of the State of Indiana as was the petition to this Court.

[14] Sailors v. Board of Educ., 387 U.S. 105, 109 (1967).

CONCLUSION

The petition for writ of certiorari should be dismissed or denied.

Respectfully submitted,

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